

Punitive Damages in Wisconsin

James D. Ghiardi

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

James D. Ghiardi, *Punitive Damages in Wisconsin*, 60 Marq. L. Rev. 753 (1977).
Available at: <http://scholarship.law.marquette.edu/mulr/vol60/iss3/4>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

PUNITIVE DAMAGES IN WISCONSIN

JAMES D. GHIARDI*

I. THEORY AND NATURE OF PUNITIVE DAMAGES

A. Introduction

Over 122 years ago the Wisconsin court decided that a plaintiff under the proper circumstances was entitled to recover exemplary or punitive damages.¹ Since the rule was first adopted it has been held that, in order to warrant the assessment of punitive damages, it must appear that the wrong was inflicted "under circumstances of aggravation, insult, or cruelty, with vindictiveness and malice."² All damages in excess of actual damages are punitive in character.³ The wisdom of the rule of punitive damages was questioned in the early cases and by Chief Justice Ryan in *Bass v. Chicago & Northwestern Railway*,⁴ but it was concluded that the policy was too well established to be overturned by judicial decision.

The principal attack upon the rule of exemplary damages related to its constitutionality. In *Brown v. Swineford*,⁵ the defendant was charged with assault and battery, and prior to the civil action the defendant had been subjected to criminal prosecution and fined. Defendant claimed that the allowance of punitive damages placed the defendant in double jeopardy. The court held that the constitutional objection was not well taken since the constitutional provision against double jeopardy forbade merely two criminal prosecutions. Exemplary damages are imposed as punishment for a private tort — not for a public crime — and are awarded to the victim, not the public.⁶

* Professor of Law, Marquette University Law School. Grateful acknowledgment is made for the invaluable research assistance of Thomas R. Schrimpf, Callahan Scholar and senior student at Marquette University Law School.

Editor's Note: This article is an updated version of the chapter on Exemplary or Punitive Damages in Professor Ghiardi's book, *PERSONAL INJURY DAMAGES IN WISCONSIN* (Callahan 1964).

1. *McWilliams v. Bragg*, 3 Wis. 424 (1854).

2. *Christensen v. Schwartz*, 198 Wis. 222, 227, 223 N.W. 839, 840 (1929).

3. *Oconto County v. Union Mfg. Co.*, 190 Wis. 44, 208 N.W. 989 (1926).

4. 42 Wis. 654 (1877).

5. 44 Wis. 282 (1878).

6. See T. Ford, *The Constitutionality of Punitive Damages*, Defense Research Institute Monograph No. 15, *The Case Against Punitive Damages* (August 1969).

Recent constitutional attacks on libel and slander law have substantially altered the allowance of punitive damages in libel cases involving matters of public interest. In *New York Times v. Sullivan*,⁷ the Supreme Court held that the constitutional guarantees of freedom of speech and of press place limitations upon state libel law. The threat of extensive punitive awards may have a chilling effect on those first amendment rights in certain cases involving the public media. Accordingly, the Supreme Court in a series of cases, has developed specific standards to be applied in libel and slander cases involving publishers and broadcasters.⁸

B. Availability of Punitive Damages

The rule is clear that punitive damages will be awarded only where the harm was inflicted "under circumstances of aggravation, insult or cruelty, with vindictiveness or malice,"⁹ or where the defendant acted in wanton, wilful or reckless disregard of the plaintiff's rights.¹⁰ In general, a tort must be accompanied by actual ill will or malevolence toward the plaintiff in order to warrant an award of punitive damages. With respect to intentional torts, the requirement of actual malice means a requirement of an intent over and above the wrongful intent necessary to sustain the action:

Any exact and precise definition of the technical term in the law of the "malice" that must be shown in order that there may be a basis for punitive damages in addition to compensatory damages for a breach of some duty by a defendant when such is the proper subject of an action in tort, is hard to find and still harder to frame. It is evident, however, from all the authorities that in any particular case, not in and of itself a malicious action, in order that punitive damages may be assessed something must be shown over and above the mere breach of duty for which compensatory damages can be given. That is, a showing of a bad intent deserving punishment, or something in the nature of special ill will towards the person injured, or a wanton, deliberate disregard of the particular duty then being breached, or that which resembles gross as distinguished from ordinary negligence.¹¹

7. 376 U.S. 254 (1964).

8. See discussion of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975), at 755-57 *infra*.

9. *McWilliams v. Bragg*, 3 Wis. 424 (1854).

10. *Kink v. Combs*, 28 Wis. 2d 65, 135 N.W.2d 789 (1965).

11. *Meshane v. Second Street Co.*, 197 Wis. 382, 387, 222 N.W. 320, 322 (1928).

Obviously, since a malicious intent is necessary, punitive damages cannot be awarded in the case of ordinary negligence.¹² Further, the intent must be premeditated as distinguished from a mere recent surge of passion,¹³ but the ill will need not have been long-harbored.¹⁴

The malice, or ill will toward plaintiff, necessary to support punitive damages, must be actual in the sense that it is express, as distinguished from constructive or implied in law. This is best illustrated by cases involving libel or slander. It might be supposed from this that exemplary damages could be awarded in any case where libel or slander would lie. The malice necessary to support such actions, however, is "implied" or "conclusively presumed" from the falsity of the defamatory words and the lack of proper motive for their publication.¹⁵ Such malice will not support exemplary damages. In order to justify the giving of such damages it must be shown that the defendant, in committing the tort, had "express malice" which is a statement motivated by ill will, spite, envy, revenge, or other corrupt motives.¹⁶ The recent case of *Calero v. Del Chemical Corp.*¹⁷ reiterated the rule that in order to recover damages in an ordinary private libel action, the plaintiff must show express malice by a preponderance of the evidence.

The rule that is applied to cases of libel and slander is said not to apply to cases of malicious prosecution since in the latter action actual malice is a necessary ingredient of the cause of action. It would appear that exemplary damages may be imposed in any case where malicious prosecution will lie.¹⁸

C. When Punitive Damages Are Not Appropriate

Punitive damages are not appropriate in breach of contract actions, even if the breach is willful.¹⁹ However, in *Mid-*

12. *Id.*

13. *Wilson v. Young*, 31 Wis. 574 (1872).

14. *Lowe v. Ring*, 123 Wis. 107, 101 N.W. 381 (1904); *Nichols v. Brabazon*, 94 Wis. 549, 69 N.W. 342 (1896).

15. *Delaney v. Keatel*, 81 Wis. 353, 51 N.W. 559 (1892); *Brueshaber v. Herting*, 78 Wis. 498, 47 N.W. 725 (1891).

16. *Grace v. McArthur*, 76 Wis. 641, 45 N.W. 518 (1890); *Eviston v. Cramer*, 57 Wis. 570, 15 N.W. 760 (1883). See also Wis. J.I.-CIVIL No. 2520.

17. 68 Wis. 2d 487, 506, 228 N.W.2d 737, 748 (1975).

18. *Fuchs v. Kupper*, 22 Wis. 2d 107, 125 N.W.2d 360 (1963).

19. *Entzminger v. Ford Motor Co.*, 47 Wis. 2d 751, 177 N.W.2d 899 (1970); *White v. Benkowski*, 37 Wis. 2d 285, 155 N.W.2d 74 (1967).

*Continent Refrigerator Co. v. Straka*²⁰ the court considered whether punitive damages should be allowed for fraud or deceit in the inducement of a contract. Prior to the instant case the only contract cases in which the court had allowed punitive damages for fraud in the inducement to contract had been actions for breach of promise to marry.²¹ *Mid-Continent* involved alleged fraud in inducing the purchase of a display freezer. The court after questioning the propriety of allowing punitive damages for fraud in the inducement of a contract, concluded:

We do not hold that fraud or deceit in the inducement of a contract can never be the basis for an award of punitive damages. We do hold that the facts of this case in the inducement to enter the contract do not justify a finding of malice, vindictiveness or wanton disregard necessary to justify the imposition of punitive damages.²²

In a recent decision the Wisconsin Supreme Court left open the question whether punitive damages were recoverable in a case involving an intentional interference with contractual rights.²³

The United States Supreme Court in a series of decisions has substantially limited the award of punitive damages in certain defamation actions. In cases involving publishers and broadcasters as defendants there must be a finding by "clear and convincing" evidence of both express malice, that is "ill will, envy, spite, revenge," and actual malice, knowledge that a statement was false or published with reckless disregard of whether it was false or not, to support an award of punitive damages.²⁴ The rule is motivated by a concern that "jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship"²⁵ which would be an intolerable infringement of the constitutionally-guaranteed freedoms of speech and press. The recent case of *Polzin v. Helmbrecht*²⁶ has stated the rule as follows:

20. 47 Wis. 2d 739, 178 N.W.2d 28 (1970).

21. *Id.* at 745, 178 N.W.2d at 31.

22. *Id.* at 748, 178 N.W.2d at 33. See also *D.R.W. Corp. v. Cordes*, 65 Wis. 2d 303, 222 N.W.2d 671 (1974).

23. *Goldman v. Home Mut. Ins. Co.*, 22 Wis. 2d 334, 126 N.W.2d 1 (1964).

24. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

25. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350.

26. 54 Wis. 2d 578, 196 N.W.2d 685 (1972).

It should finally be noted that in a case such as this where the *New York Times* standards apply and where punitive damages are sought there must be a finding of both express and actual malice to support an award of punitive damages: "Express malice" to meet criteria for awarding punitive damages and "actual malice" to meet the constitutional requirements for liability at all.²⁷

In ordinary private libel actions involving neither matters of public interest, the media, nor public figures, the plaintiff may recover punitive damages upon a showing of express malice by a preponderance of the evidence.²⁸

D. When Actual Malice Is Not Necessary

Exceptions to the rule that actual malice is necessary to sustain an award of punitive damages have arisen. The first of these exceptions is the case where the defendant, while perhaps not actuated by ill will toward the plaintiff, has nevertheless acted with wanton or reckless disregard of the plaintiff's rights. In *Kink v. Combs*,²⁹ a case involving a sexual assault, the plaintiff was awarded a substantial amount of punitive damages. On appeal the defendant claimed that punitive damages were inappropriate because his acts were not activated by malice or vindictiveness. The court held that malice or vindictiveness was not the sine qua non of punitive damages. The court stated: "For the award of punitive damages it is sufficient that there be a showing of wanton, wilful, or reckless disregard of the plaintiff's rights."³⁰ However, where no express malice is shown the character of the offense must have the outrageousness associated with serious crime.³¹

The law in Wisconsin is somewhat uncertain as to whether conduct formerly characterized as gross negligence can be made the basis of a verdict for exemplary damages. Early Wisconsin cases allowed punitive damages for conduct amounting to gross negligence. In *Meibus v. Dodge*³² the plaintiff was attacked and bitten by a vicious dog belonging to the defendant.

27. *Id.* at 588, 196 N.W.2d at 691.

28. *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975); Wis. J.I. - CIVIL No. 2520.

29. 28 Wis. 2d 65, 135 N.W.2d 789 (1965).

30. *Id.* at 79, 135 N.W.2d at 797.

31. *Entzminger v. Ford Motor Co.*, 47 Wis. 2d 751, 177 N.W.2d 899 (1970); *Jones v. Fisher*, 42 Wis. 2d 209, 166 N.W.2d 175 (1969).

32. 38 Wis. 300 (1875).

It was alleged and proved that the defendant knew of the vicious propensities of the dog and negligently permitted him to run at large. It was held that the defendant was guilty of wanton and reckless conduct, amounting to malice and justifying exemplary damages.³³

However, in *Bielski v. Schulze*³⁴ the court abolished the doctrine of gross negligence and apparently limited punitive damage awards to intentional torts. The court stated:

We recognize the abolition of gross negligence does away with the basis for punitive damages in negligence cases. But punitive damages are given, not to compensate the plaintiff for his injury but to punish and deter the tortfeasor, and were acquired by gross negligence as accountrements of intentional torts. Wilful and intentional torts, of course, still exist, but should not be confused with negligence. See sec. 481, p. 1260, Restatement, 2 Torts. The protection of the public from such conduct or from reckless, wanton, or wilful conduct is best served by the criminal laws of the state.³⁵

Notwithstanding the court's statement it is likely that punitive damages can be recovered in cases where the defendant's conduct amounts to what was formerly categorized as gross negligence; that is where defendant has acted in wanton, wilful, or reckless disregard of the plaintiff's rights.³⁶

In *Kink v. Combs*³⁷ the court rejected the rationale that reckless, wanton or wilful conduct was best dealt with by the Criminal Code. Without mentioning *Bielski* the court stated:

Suffice it to say that whatever shortcomings the award of punitive damages may have, nevertheless, it must be remembered that it has the effect of bringing to punishment types of conduct that though oppressive and hurtful to the individual almost invariably go unpunished by the public prosecutor.³⁸

33. See also *Theby v. Wisconsin Power & Light Co.*, 197 Wis. 601, 222 N.W. 826 (1929); *Meshane v. Second Street Co.*, 197 Wis. 382, 222 N.W. 320 (1928); *Rueping v. Chicago & N.W. Ry.*, 116 Wis. 625, 93 N.W. 843 (1903); *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003 (1900).

34. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

35. *Id.* at 18, 114 N.W.2d at 113.

36. See Walther & Plein, *Punitive Damages: A Critical Analysis: Kink v. Combs*, 49 MARQ. L. REV. 369 (1965).

37. 28 Wis. 2d 65, 135 N.W.2d 789 (1965).

38. *Id.* at 80, 135 N.W.2d at 798.

Although *Kink v. Combs* and subsequent cases following its rule involved intentional torts, the character of the conduct supporting punitive damages is similar to that form formally called gross negligence. While *Bielski* abolished the doctrine of gross negligence as a legal doctrine, in fact wanton, wilful or reckless conduct still exists. If this conduct is labeled negligent, rather than intentional, damages could still be awarded.

As of this writing there has not been a post-*Bielski* Wisconsin case involving an award of punitive damages in a negligence action alleging wanton or reckless conduct. The United States District Court, in *Drake v. Wham-o Manufacturing Co.*,³⁹ considered plaintiff's complaint in a product liability case alleging a wanton disregard for the safety and well being of the plaintiff's deceased husband, and demanding punitive damages. The defendants argued that punitive damages were only available for intentional torts and, therefore, plaintiff failed to state a claim upon which relief could be granted. The district court construing Wisconsin law stated that Wisconsin law would arguably allow punitive damages in a products liability case where there is a showing of wanton, wilful, or reckless disregard of the plaintiff's rights.

A second exception to the rule requiring actual malice is found in a parent's action for the seduction of his daughter. *Klopper v. Bromme*,⁴⁰ was an action by plaintiff for the debauching of his daughter and it was assumed that it was proper to award punitive damages although the defendant did not entertain ill-will toward the plaintiff. This was followed in *Luther v. Shaw*⁴¹ where the court pointed out that the fact that the debauched daughter had been allowed punitive damages did not prevent or reduce the amount to be recovered by the father. It has been suggested that these cases can be disposed of under the first exception as indicating a wanton disregard of the rights of the parent by the defendant.⁴²

E. Proof of Malice

The finding of "malice" justifies an award of punitive damages. Malice is a subjective state of mind, evinced only by overt

39. 373 F. Supp. 608 (E.D. Wis. 1974).

40. 26 Wis. 373 (1870).

41. 157 Wis. 234, 147 N.W. 18 (1914).

42. See Wickhem, *The Rule of Exemplary Damages in Wisconsin*, 2 Wis. L. Rev. 129 (1923) [hereinafter cited as Wickhem].

acts, such as words or conduct. From such acts the malicious intent of the defendant may be inferred.⁴³ In *Spear v. Sweeney*⁴⁴ the court stated that words spoken before and after the particular assault were admissible to prove express malice. Where the defendant's conduct is outrageous, wanton or in reckless disregard of the plaintiff's rights proof of malicious intent is not necessary; the character of the act is a sufficient basis for an award of punitive damages.⁴⁵ In a recent case, *Roach v. Keane*,⁴⁶ the court allowed punitive damages in a cause of action for alienation of affection and criminal conversation⁴⁷ although the record contained no evidence that the defendant was an insensitive homewrecker or had any malicious intentions. If the words or conduct are unequivocal they are competent to prove express malice. If they are equivocal then their meaning is for the jury.

F. Malice and Compensatory Damages

The aggravated conduct of the defendant, exposing the plaintiff to humiliation, disgrace, insult or indignity which causes mental suffering, may be the basis for compensatory damages no matter what the motive of the defendant may be, and such conduct may also be taken by the jury to evince malice on the part of the defendant and to justify the giving of punitive damages. The Wisconsin Supreme Court, in *Wilson v. Young*⁴⁸ and *Gatzow v. Buening*,⁴⁹ indicated that malice had no effect on compensatory damages either physical or mental.

This should not give rise to confusion, for although exemplary damages are defined as an award over and above the amount necessary to compensate for injuries sustained, this means that compensation does not enter the field of exemplary damage. The fact that exemplary damages are awarded does not preclude plaintiff from having full damages for mental suffering, humiliation and disgrace occasioned by the aggravated

43. See Wis. J.I. - CIVIL No. 1707.

44. 88 Wis. 545, 60 N.W. 1060 (1894).

45. See *Kink v. Combs*, 28 Wis. 2d 65, 135 N.W.2d 789 (1965) (sexual assault); *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003 (1900) (denial of the use of a hearse); *Meibus v. Dodge*, 38 Wis. 300 (1875) (allowing a vicious dog to run loose).

46. 73 Wis. 2d 524, 243 N.W.2d 508 (1976).

47. Actions for alienation of affection and criminal conversation are now barred by Wis. STAT. § 248.01 (1973).

48. 31 Wis. 574 (1872).

49. 106 Wis. 1, 81 N.W. 1003 (1900).

character of the defendant's acts. In assessing compensatory damages it is the character of the act and not the motive that is important.

Malice as a mental state is frequently evidenced by acts and conduct that have a natural tendency to produce mental suffering, but in assessing exemplary damages the character of these acts is only important insofar as it indicates objectively that the defendant was malicious. In the case of compensatory damages for mental suffering the motive of the defendant is of no consequence; mere motive cannot inflict mental suffering, it can be inflicted only by acts or conduct. The character of the act and its tendency to produce mental suffering is considered. This reasoning was important in the case of *Craker v. Chicago & Northwestern Railway*⁵⁰ where the defendant's agent committed a battery on the plaintiff while she was a passenger on the defendant's train. The defendant was not held liable for punitive damages for although the acts were within the scope of the agent's employment, the principal did not participate in the agent's motive. On the other hand the mental suffering, vexation and anxiety suffered by the plaintiff were compensable in damages and liability would attach because of the aggravated nature of the acts.

G. Effect of Plaintiff's Provocative Conduct

The question arises as to whether the plaintiff's provocative conduct will prevent the recovery of punitive damages or reduce the amount of recovery or both. Generally, the rule is that the provocative conduct of the plaintiff will not reduce the amount of, nor prevent the recovery of compensatory damages, unless it amounts to self-defense or consent.⁵¹

It has been said by some courts that the malicious acts of the plaintiff may be weighed against the malicious acts of the defendant and exemplary damages reduced or denied according to the findings of the jury.⁵² For a time it appeared that this was the Wisconsin rule. In *Brown v. Swineford*,⁵³ the court relied on two prior Wisconsin decisions for the rule "that provocation may go to exclude exemplary damages. In such a case,

50. 36 Wis. 657 (1875).

51. *Prindle v. Haight*, 83 Wis. 50, 52 N.W. 1134 (1892); *Grace v. Dempsey*, 75 Wis. 313, 43 N.W. 1127 (1889); *Shay v. Thompson*, 59 Wis. 540, 18 N.W. 473 (1884).

52. *Kiff v. Youmans*, 86 N.Y. 324 (1881).

53. 44 Wis. 282 (1878).

it is malice against malice; the malice of the plaintiff precluding him from recovery for the malice of the defendant, provoked by his own."⁵⁴ However, this is not the Wisconsin rule. In *Prindle v. Haight*⁵⁵ the defendant was held not to be entitled to balance against the deliberate malice of his act a malicious course of conduct on the part of plaintiff. The defendant was limited to showing such provocation on the part of plaintiff (malicious or otherwise) as would show that he did not act with deliberate malice. Thus provocation of the plaintiff is admissible not to mitigate the damages but to prove that there was no malice on the part of the defendant. The defendant who acts under provocation by the plaintiff is subject to exemplary damages if the provocation is too slight to account for his act and also if there appears to have been the slightest degree of deliberation in his conduct no matter how great the provocation. If the facts are that the defendant acted impulsively and with sufficient provocation, it is a natural conclusion that he acted without deliberate malice.⁵⁶

H. Function of Court and Jury

Before the question of the allowance of punitive damages in a tort action can properly be submitted to the jury, the trial court must first determine, as a matter of law, whether the situation disclosed is within the field recognized by law as a proper one for the allowance of punitive damages.⁵⁷ In *Topolewski v. Plankinton Packing Co.*,⁵⁸ the court, citing prior decisions, stated:

It was there distinctively held that punitory damages are not allowable as a matter of legal right; that in all cases the court should decide whether, in any reasonable view of the evidence, punitory damages would be proper and, if so, to then instruct the jury what elements of fact are requisite to justify such damages and make it plain that whether to allow them or not is left to their sound discretion.⁵⁹

54. *Id.* at 290.

55. 83 Wis. 50, 52 N.W. 1134 (1892).

56. Wickhem, *supra* note 42, at 145. See also *Schultz v. Frankfort Marine, Acc. & Plate Glass Ins. Co.*, 151 Wis. 537, 139 N.W. 386 (1913); *Barnes v. Martin*, 15 Wis. 263 (1862).

57. *Meshane v. Second Street Co.*, 197 Wis. 382, 222 N.W. 320 (1928).

58. 143 Wis. 52, 126 N.W. 554 (1910).

59. *Id.* at 71, 126 N.W. at 561.

Thus, the court determines from the evidence that the jury could draw an inference of malice from the facts presented, and then submits it to the jury for an award of such damages, in their discretion. On the other hand, if the court determines that no such inference can be drawn from a reasonable view of the evidence then the issue is not to be submitted to the jury and the award of punitive damages is not an issue.⁶⁰ In the absence of such evidence the trial court is not to submit the issue of punitive damages to the jury and if he does the supreme court will reverse. On the other hand, if the evidence gives rise to a question of fact on the issue of malice the plaintiff has a right to have the issue of punitive damages submitted to the jury.

The award of punitive damages in a particular case is entirely within the discretion of the jury.⁶¹ It is error for the trial judge to instruct the jury that they must or should award such damages.⁶² The plaintiff has no right to an assessment of punitive damages and any instruction placing such a duty on the jury is erroneous.⁶³ In *Tilton v. J.L. Gates Land Co.*⁶⁴ the court stated:

Courts generally hold that punitive damages are not assessable as a matter of right, and this court has so held in *Robinson v. Superior R.T.R. Co.*, 94 Wis. 345, 68 N.W. 961, where the authorities on the point are reviewed. The question of the allowance or disallowance of punitive damages is one for trial courts and juries to pass upon, and this court will not reverse a judgment for failure to award such damages, nor will it undertake to make an assessment of the same.⁶⁵

An instruction that the plaintiff was "also entitled" to punitives was held erroneous.⁶⁶ An instruction that the jury was "authorized" to award punitives, was held to be technically correct but was criticized by the court as being misleading and

60. *Id.*

61. *Asplund v. Palmer*, 258 Wis. 34, 44 N.W.2d 624 (1950); *Topolewski v. Plankinton Packing Co.*, 143 Wis. 52, 126 N.W. 554 (1910); *Eggett v. Allen*, 119 Wis. 625, 96 N.W. 803 (1903).

62. *Lechren v. Ebenreiter*, 235 Wis. 244, 292 N.W. 913 (1940); *Topolewski v. Plankinton Packing Co.*, 143 Wis. 52, 126 N.W. 554 (1910).

63. *Huggard v. Chicago, M. & St. P. Ry.*, 158 Wis. 1, 147 N.W. 1020 (1914).

64. 140 Wis. 197, 121 N.W. 331 (1909).

65. *Id.* at 210, 121 N.W. at 336.

66. *Robinson v. Superior Rapid Transit Ry.*, 94 Wis. 345, 68 N.W. 961 (1896).

not clearly pointing out the discretionary power of the jury.⁶⁷ *Huggard v. Chicago, Milwaukee & St. Paul Railway*⁶⁸ exemplifies this discretionary power. The jury came in with a special verdict which had a finding of malice, but no award of punitive damages. The court held that there was no inconsistency in such a verdict. The court will not reverse a jury determination that punitives should not be awarded. In *Haberman v. Gasser*⁶⁹ the court held that the instruction to the jury that it was "their privilege in this case" to give punitive damages was misleading and erroneous. After instructing the jury as to what elements of fact are requisite to justify punitives a proper instruction would be phrased as follows:

Punitive damages are never a matter of right, but, when allowable, may be awarded or withheld in the discretion of the jury. Punitive damages may not be awarded unless the acts of the defendant in question were done maliciously or in willful or reckless disregard of the plaintiff's rights, and, even if malicious, willful or reckless, you may withhold or allow punitive damages as you see fit.⁷⁰

In *Lisowski v. Chenenoff*⁷¹ the court held that the trial court correctly instructed the jury that punitive damages are assessed not to compensate the injured but as a punishment to the tortfeasor and as a deterrent to others.⁷²

I. *Remittitur and Additur*

Despite the jury's broad discretion the court still retains supervisory power over the amount of punitives to be awarded. In *Malco v. Midwest Aluminum Sales, Inc.*⁷³ the court extended application of the *Powers* rule to punitive awards. The court stated:

In *Powers v. Allstate Ins. Co.* (1960), 10 Wis. (2d) 78, 102 N.W. (2d) 393, we changed the rule of options as applied to compensatory damages and allowed the trial court to determine what it thought to be a reasonable sum and to grant the

67. *Eggett v. Allen*, 119 Wis. 625, 96 N.W. 803 (1903).

68. 158 Wis. 1, 147 N.W. 1020 (1914).

69. 104 Wis. 98, 80 N.W. 105 (1899).

70. Wis. J.I. - CIVIL No. 1707.

71. 37 Wis. 2d 610, 155 N.W.2d 619 (1968).

72. See also *Malco, Inc. v. Midwest Aluminum Sales, Inc.*, 14 Wis. 2d 57, 109 N.W.2d 516 (1961); *Vieth v. Dorsch*, 247 Wis. 17, 79 N.W.2d 96 (1956); Wis. J.I. - CIVIL No. 1707.

73. 14 Wis. 2d 57, 109 N.W.2d 516 (1961).

plaintiff the option to accept it or have a new trial. It seems to us that once the jury has decided in its discretion to award punitive damages, the amount thereof must be subject to the control of the court. True, the jury need not award any punitive damages, but having done so, the amount thereof should be subject to the court's revision in the same manner as compensatory damages. It is not logical to say excessive punitive damages cannot be reduced by the court to a reasonable amount because the jury had the power to deny any amount. In such cases, the fact is the jury exercised its discretion and made an excessive award of punitive damages. We held that the *Powers* rule extends to punitive damages and a trial court has the power to reduce the amount of punitive damages to what it determines is a fair and reasonable amount for such kind of damages.⁷⁴

However, where the verdict is so clearly excessive as to indicate that it is the result of passion, prejudice, or corruption, or it is clear that the jury disregarded the evidence, the *Powers* rule is inapplicable and the trial court should set aside the entire verdict rather than attempt to cure it by invoking the *Powers* rule.⁷⁵

The trial court's award of punitive damages is subject to review on appeal by the supreme court. The trial court's determination will not be disturbed unless there has been an abuse of discretion or where the verdict is so clearly excessive as to indicate passion and prejudice.⁷⁶ A party who has exercised an option to accept a reduced award, remitting the excess to avoid a new trial may have a review on appeal without waiving the benefits of his acceptance if the opposing party appeals the judgment.⁷⁷

The trial court can not exercise additur, in view of the proposition that the determination of whether punitives are to be awarded, as well as the amount thereof, is solely within the discretion of the jury. Therefore, no amount awarded could be unreasonably low. The plaintiff cannot complain if the jury fails to award such damages or awards an inadequate amount since in theory he has been fully compensated for his injuries

74. *Id.* at 65, 109 N.W.2d at 521.

75. *Meke v. Nicol*, 56 Wis. 2d 654, 203 N.W.2d 129 (1973).

76. *Kink v. Combs*, 28 Wis. 2d 65, 135 N.W.2d 789 (1965); *Fuchs v. Kupper*, 22 Wis. 2d 107, 125 N.W.2d 360 (1963).

77. *Dalton v. Meister*, 52 Wis. 2d 173, 188 N.W.2d 494 (1971).

and punitive damages are over and above such compensation. Even though the evidence would sustain an award of punitive damages, it is not error if the jury fails to award them.⁷⁸

II. EVIDENTIARY MATTERS AFFECTING PUNITIVE DAMAGES

A. *Actual Damages Necessary to Sustain an Award*

Wisconsin follows the general rule that a claim for punitive damages alone is insufficient as a basis for a cause of action, and that in order to justify the recovery of punitive damages there must be a showing of actual injury which would justify an award of actual or compensatory damages. In *Maxwell v. Kennedy*⁷⁹ the court quoted from *Stacey v. Portland Publishing Co.*⁸⁰ as follows:

There is no room for punitive damages here. There is no foundation for them to attach or rest upon. It is said, in vindication of the theory of punitive damages, that the interests of the individual injured and society are blended. Here the interests of society have virtually nothing to blend with. If the individual has but a nominal interest, society can have none. Such damages are to be awarded against a defendant for punishment. But, if all of individual injury is merely technical and theoretical, what is the punishment to be inflicted for? If a plaintiff, upon all such elements of injury as were open to him, is entitled to recover but nominal damages, shall he be the recipient of penalties awarded on account of an injury, or supposed injury, to others beside himself? Punitive damages are the last to be assessed in the elements to be considered by a jury, and should be the first to be rejected by facts in mitigation.⁸¹

The decision also points out that nominal damages are not a sufficient basis for a punitive damage award.⁸²

In *Hanson v. Valdiva*,⁸³ plaintiff's decedent had committed suicide after the defendant had alienated the affections of his wife. The plaintiff, as special administrator of decedent's es-

78. *Malco, Inc. v. Midwest Aluminum Sales, Inc.*, 14 Wis. 2d 57, 109 N.W.2d 516 (1961).

79. 50 Wis. 645, 7 N.W. 657 (1880).

80. 68 Me. 279 (1878).

81. 50 Wis. at 648, 7 N.W. at 658.

82. See also *Hanson v. Valdivia*, 51 Wis. 2d 466, 187 N.W.2d 151 (1971); *Widemshiek v. Fale*, 17 Wis. 2d 337, 117 N.W.2d 275 (1962); *Barnard v. Cohen*, 165 Wis. 417, 162 N.W. 480 (1917).

83. 51 Wis. 2e 466, 187 N.W.2d 151 (1971).

tate, commenced an action to recover both compensatory and punitive damages. The court held that a cause of action for damages for loss of services or consortium did not survive the decedent under Wisconsin's survival statute. Since there must be a showing of some actual injury which would justify an award of compensatory damages before punitive damages may be awarded, plaintiff's cause of action for punitive damages was dismissed.

An interesting issue was raised in *Gatzow v. Buening*,⁸⁴ in which an action was brought to recover for humiliation and mental distress as a result of the willful conduct of the defendant in denying the plaintiff the use of a hearse at the funeral of the plaintiff's four-year-old son. Under the then existing rule, damages for mental suffering were not recoverable in the absence of physical injury. Today, in order to recover damages for mental distress the plaintiff must demonstrate that he suffered an extreme disabling emotional response to the defendant's conduct.⁸⁵ The *Gatzow* case involved mental suffering, but not of sufficient degree to allow damages under *Alsteen v. Gehl*.^{85.1} The issue could be raised that if there is mental suffering, but this is not recoverable because it is not part of another cause of action, such as assault and battery, shouldn't punitive damages be allowed? Mental suffering, if proven, could be actual harm. However, it would appear from the *Gatzow*, *Alsteen* and *Maxwell* cases that such suffering, in the absence of circumstances entailing a judgment of compensatory damage, could not be the basis for an award of punitives.

In *Craker v. Chicago & Northwestern Railway*⁸⁶ plaintiff sued for insulting, violent and abusive acts resulting when the defendant's conductor kissed her against her will. Testimony indicated that she was not actually injured but the court stated that "in actions for personal tort, mental suffering, vexation and anxiety are subject to compensation in damages." The court indicated that if malice was proven exemplary damages could be added to the compensatory damages.

B. Wealth of Defendant

The only form of an exemplary damage award is money

84. 106 Wis. 1, 81 N.W. 1003 (1900).

85. *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963).

85.1. *Id.*

86. 36 Wis. 657 (1875).

damages, therefore the wealth of the defendant will have an important bearing on the amount that will properly punish and deter him. An award that will punish a poor man may have little effect on a man of great wealth. For this reason evidence of the wealth of the defendant is admissible.⁸⁷

The defendant's wealth for the purpose of determining punitive damages need not be determined exactly as of the day of trial and needs only to be reasonably accurate.⁸⁸ In *Jones v. Fisher*⁸⁹ the court held that a defendant's earnings and financial resources as well as his net worth are admissible as an aid to the jury in fixing punitive damages. This evidence may also be introduced by showing the defendant's "reputed wealth."⁹⁰ The plaintiff is not required to go into any details as to the exact property of the defendant but the defendant may introduce evidence of his limited financial resources, even though no attempt has been made to show that he is a person of wealth.

In *Ogodziski v. Gara*⁹¹ the court held that an instruction to the jury that the amount of punitives "is governed by the wealth of the party" was erroneous. The defendant's wealth is only a circumstance to be considered in assessing punitives. In theory, this rule is correct as to punitive damages, but in practice it might tend to, and often does, unduly prejudice the jury upon the merits of the case and the amount of compensatory damages.⁹²

The chief difficulty in applying the rule as to proof of wealth has been in the case of a joint tort where there are two or more defendants. Although punitive damages may be awarded where there is one judgment against several tortfeasors, the court has held that evidence of the wealth of one defendant is prejudicial to the rights of the other, since both defendants are

87. *Dalton v. Meister*, 52 Wis. 2d 173, 188 N.W.2d 494 (1971); *Fuchs v. Kupper*, 22 Wis. 2d 107, 125 N.W.2d 360 (1963); *Malco, Inc. v. Midwest Aluminum Sales, Inc.*, 14 Wis. 2d 57, 109 N.W.2d 516 (1961); *Lehner v. Berlin Publishing Co.*, 211 Wis. 119, 246 N.W. 579 (1933); *Ogodziski v. Gara*, 173 Wis. 380, 181 N.W. 231 (1921); *Draper v. Baker*, 61 Wis. 450, 21 N.W. 527 (1884); and *Meibus v. Dodge*, 38 Wis. 300 (1875).

88. *Dalton v. Meister*, 52 Wis. 2d 173, 188 N.W.2d 494 (1971).

89. 42 Wis. 2d 209, 166 N.W.2d 175 (1969).

90. *Draper v. Baker*, 61 Wis. 450, 21 N.W. 527 (1884).

91. 173 Wis. 380, 181 N.W. 231 (1921).

92. *Wickhem*, *supra* note 42, at 155.

jointly and severally liable the poorer defendant will be unjustly injured, because of the wealth of his co-defendant.⁹³

C. Prior Actions

The question often arises as to the effect of a prior action resulting in tort liability on the part of the defendant for the same conduct. In *Luther v. Shaw*⁹⁴ a parent sued for his damages as a result of the wrongful seduction of his daughter. Punitive damages were allowed the parent and the court stated that the mere fact that the daughter had also brought an action against the defendant in which she was allowed punitives would not prevent recovery or reduce the amount of punitives recoverable by the father. A similar question arises as to the effect of a criminal suit or potential criminal liability against the defendant. In *Klopper v. Bromme*⁹⁵ the court held that the mere possibility that the defendant might be prosecuted criminally was not a matter which the jury was to consider for the purpose of reducing exemplary damages.

D. Intoxication

In *Schmidt v. Pfeil*⁹⁶ the defendant requested an instruction that since he was intoxicated at the time of the act this should be considered by the jury in reducing the amount of punitive recovery. The trial court instructed the jury that the intoxication of the defendant was not a mitigating circumstance to be taken into consideration. The supreme court stated that since there was no evidence to show that the defendant was in such a state of intoxication so as to be deprived of his reason, "or irresponsible for his acts," his condition would not mitigate the result. The issue raised is similar to the statutory defense of intoxication in a criminal case.⁹⁷ In *State v. Guiden*⁹⁸ the court stated that in order to be relieved from responsibility for criminal acts the defendant must establish that degree of intoxication that means he was utterly incapable of forming the intent necessary for the crime charged. Adapting the court's holding

93. *Meke v. Nicol*, 56 Wis. 2d 654, 203 N.W.2d 129 (1973); *McAllister v. Kimberly-Clark Co.*, 169 Wis. 473, 173 N.W. 216 (1919).

94. 157 Wis. 234, 147 N.W. 18 (1914).

95. 26 Wis. 372 (1870).

96. 24 Wis. 452 (1869).

97. WIS. STAT. § 939.42 (1973).

98. 46 Wis. 2d 328, 174 N.W.2d 488 (1970).

to the issue in *Schmidt* it appears that unless the defendant is deprived of his reason or becomes irresponsible for his acts, as a result of intoxication, this fact is not to be considered as a mitigating circumstance.

E. Reputation

In actions to recover for injury to reputation, such as slander or libel, the bad reputation of the plaintiff is a mitigating factor as to actual damages. The same rule is applicable to punitive damages in such cases. In *Maxwell v. Kennedy*⁹⁹ the court stated that "no distinction should be made in the class of damages, whether compensatory or punitive, as the subject of mitigation by proof of bad reputation."¹⁰⁰ If the defendant can prove that the plaintiff's reputation is so bad that the wrongful acts of the defendant were not likely to injure him in any degree, or in any great degree, this may be taken into consideration in mitigation of damages, actual or punitive.¹⁰¹

F. Must Punitives Be Proportionate to the Compensatory?

Although early Wisconsin decisions indicated that punitive damages must be proportionate to compensatory damages, it is doubtful that this is now the rule in Wisconsin. In *Malco, Inc. v. Midwest Aluminum Sales, Inc.*¹⁰² the rule was limited to cases involving injury to reputation, such as slander, libel, or malicious prosecution. In the recent libel case of *Calero v. Del Chemical Corp.*,¹⁰³ the court reviewed the various standards previously set forth by the court for reviewing the reasonableness of punitive damage awards. The court stated:

This court has stated that punitive damages ". . . should be proportionate with compensatory damages. . . ." *Wozniak v. Local 1111 of the UE* (1973), 57 Wis. 2d 725, 731, 205 N.W.2d 369. In the present case the awards were \$10,000 compensatory damages with \$9,000 punitive damages. This court has also stated: "There is no arbitrary rule that punitive damages cannot equal 15 times the compensatory damages." *Malco v. Midwest Aluminum Sales* (1961), 14 Wis. 2d 57, 66, 109 N.W.2d 516. This court has also said that it is

99. 50 Wis. 645, 7 N.W. 657 (1880).

100. *Id.* at 648, 7 N.W. at 658.

101. *Schultz v. Frankfort Marine Acc. & Plate Glass Ins. Co.*, 151 Wis. 537, 139 N.W. 386 (1913).

102. 14 Wis. 2d 57, 109 N.W.2d 516 (1961).

103. 68 Wis. 2d 487, 228 N.W.2d 737 (1975).

relevant to consider the maximum fine in the Criminal Code governing similar offenses. *Wozniak*, page 731; *Meke v. Nicol* (1973), 56 Wis. 2d 654, 664, 203 N.W.2d 129. The maximum fine for defamation under sec. 942.01, Stats., is \$1,000. The award here is nine times that. In *Meke* this court considered an award of punitive damages 13 times the maximum fine for a similar offense as but one element in its decision to set aside the verdict. But in *Dalton v. Meister*, *supra*, page 181, this court upheld an award of \$75,000 in punitive damages in a libel case where the maximum fine was as it is here, \$1,000, stating “. . . this court has set no arbitrary maximum” on punitive damage awards.¹⁰⁴

In *Dalton v. Meister*,¹⁰⁵ another libel case, the court stated that there is no arithmetic proportion to which punitive damages should relate to the damage done the plaintiff.

In light of the *Calero* and *Dalton* decisions, the proportionate rule for punitive damages is not an absolute standard, but rather one factor in determining the reasonableness of the punitive damage award. Other factors to be considered include: the wealth of the defendant, the triviality of defendant's act, the degree of malicious intention, potential damage which might have been done, the maximum criminal fine for similar conduct, and the purposes for which punitive damages are awarded — to punish the wrongdoer and to deter others from like conduct.

III. LIABILITY OF PRINCIPAL FOR PUNITIVE DAMAGES

A. *Permissible Punitive Damages*

Ordinarily, the principal is not liable for exemplary damages as a result of the malicious conduct of an employee, agent or servant. The reason is that although the act may be committed within the scope of the employee's employment and for the benefit of the principal, ordinarily the principal does not participate in the malicious motive of the employee.¹⁰⁶ Although the act is done within the scope of employment so as to render the principal liable for the actual damage suffered, such an act,

104. *Id.* at 510-11, 228 N.W.2d at 750. In *Roach v. Keane*, 73 Wis. 2d 524, 243 N.W.2d 508 (1976), the court compared the maximum criminal fine for adultery, \$1,000, with the punitive damage award of \$10,000 and held that the award was clearly excessive in light of the facts.

105. 52 Wis. 2d 173, 188 N.W.2d 494 (1971), *cert. denied*, 405 U.S. 934 (1972).

106. *Craker v. Chicago & N.W. Ry.*, 36 Wis. 657 (1857).

if done with a malicious motive does not in and of itself render the principal liable for punitive damages.¹⁰⁷

The purpose of an exemplary damage award is to punish and deter the offender; therefore, it would seem that such may be awarded only against a person who in some way has participated in the commission of the malicious act. Thus, a principal may be held liable in punitive damages for the concededly malicious tort of his agent only when he has either authorized, ratified or conspired in the malicious conduct of his employee or agent.¹⁰⁸ Authorization or conspiracy cases are rare. *Gatzow v. Buening*¹⁰⁹ may be a factual example of conspiracy or authorization. In that case, the defendant either requested the malicious act to be performed or ratified the request by another person. Moreover, it appears that the defendants had in fact conspired to cause the harm. Of course, a corporation is liable in exemplary damages for its own malicious act, that is to say, for the act of its directors or other agents whose act is the act of the corporation. The *Restatement of Agency* states the rule as follows:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:

- (a) the principal authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal was reckless in employing him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the principal or a managerial agent of the principal ratified or approved the act.¹¹⁰

In *Garcia v. Samson's Inc.*¹¹¹ it was held that no recovery could be had for punitive damages from the employer in the absence of proof that the employer authorized or ratified the alleged tortious act. Ratification is a fact to be determined by the jury, and where the jury was not asked to pass upon the

107. *Vassau v. Madison Elec. Ry.*, 106 Wis. 301, 82 N.W. 152 (1900); *Milwaukee & Miss. R.R. v. Finney*, 10 Wis. 330 (1860).

108. *Robinson v. Superior Rapid Transit Ry.*, 94 Wis. 345, 68 N.W. 961 (1896); *Craker v. Chicago & N.W. Ry.*, 36 Wis. 657 (1857).

109. 106 Wis. 1, 81 N.W. 1003 (1900).

110. *RESTATEMENT (SECOND) OF AGENCY* § 217C (1957).

111. 10 Wis. 2d 515, 103 N.W.2d 565 (1960).

question nor instructed with reference to the ratification, the trial court was justified in granting a motion for a new trial.

B. Proof of Ratification

The majority of cases in this field involve the problem of ratification. Retention of the agent after the principal has knowledge of the malicious conduct is evidence of ratification. "[R]esponsibility for exemplary damages in cases of ratification will be an admonition for the prompt dismissal of offending officers, as their retention might well be held evidence of ratification."¹¹² The evidentiary weight of retention may be diminished by the peculiar set of facts involved. In *Vassau v. Madison Electric Railway*¹¹³ the court found that the agent had not acted maliciously but the opinion indicated that, since the agent was one of the principal's oldest employees, having worked for him for twenty years, retention would not be ratification as a matter of law. "Mere failure to dismiss a servant, unaccompanied by conduct indicating approval of the wrongful conduct, is not a sufficient basis on which to impose punitive damages."¹¹⁴

Ratification requires knowledge of the fact or act to be ratified on the part of the principal.¹¹⁵ The question of what constitutes notice or knowledge necessary to amount to ratification has been involved in several cases. In *Robinson v. Superior Rapid Transit Railway*¹¹⁶ the trial court held, as a matter of law, that the principal had knowledge, the only evidence thereof being the facts alleged in the complaint as served on the defendant. The supreme court reversed on the ground that the defendant is not conclusively bound to know of the malice, merely because it was so alleged in the complaint. However, *Bass v. Chicago & Northwestern Railway*,¹¹⁷ decided twenty years before the *Robinson* decision, indicated that the contents of the complaint are to be considered as a factor in notifying the principal of his agent's conduct.

The knowledge of the malicious agent apparently does not

112. *Bass v. Chicago & N.W. Ry.*, 42 Wis. 654, 667 (1877).

113. 106 Wis. 301, 82 N.W. 152 (1900).

114. RESTATEMENT (SECOND) OF AGENCY § 217C, comment b (1957).

115. *Mid-Continent Refrigeration Co. v. Straka*, 47 Wis. 2d 739, 178 N.W.2d 28 (1970).

116. 94 Wis. 345, 68 N.W. 961 (1896).

117. 42 Wis. 654 (1877).

constitute notice to the principal. The reason for this is, presumably, that the agent has no duty to disclose such information to his principal, or that no knowledge can be imputed to the principal where the agent is engaged in conduct adverse to the interests of his principal. Perhaps, the latter ground is the one implicitly used by the courts. In the *Bass* case,¹¹⁸ the court held that notice of a brakeman's malicious conduct on the part of the conductor was notice to the corporation, although the conductor never communicated the fact to higher corporate officers. This would indicate that if a supervising agent learns of facts relative to a subordinate employee or agent this becomes the knowledge of the corporation, since knowledge of such conduct is not adverse to the interest of the principal. On the other hand, where the conductor is the malicious agent himself, the court has failed to find an imputation of knowledge, for then the conductor is engaged in conduct adverse to the interests of the principal.¹¹⁹ The same result was achieved in *Mace v. Reed*¹²⁰ where the defendant was the owner of a boat on which the plaintiff was injured when the captain thereof, with apparent malice, committed a battery on the person of the plaintiff.

The purposes of the doctrine of imputed liability for compensatory damages is to deter the employer from employing vicious, incompetent or negligent employees. This liability should be a sufficient deterrent without having to impose punitive damages upon an employer who has been entirely innocent of any malice. Any other result would be unduly harsh.

IV. SUMMARY

The foregoing analysis involves situations where punitive damages are allowed in civil suits under the common law. Generally, punitive damages will be awarded where the harm was inflicted under circumstances of aggravation, insult or cruelty, with vindictiveness or malice, or where the defendant acted in wanton, wilful or reckless disregard of the plaintiff's rights. Another situation in which punitives may be awarded is where

118. *Id.*

119. *Huggard v. Chicago, M. & St. P. Ry.*, 158 Wis. 1, 147 N.W. 1020 (1914); *Vassau v. Madison Elec. Ry.*, 106 Wis. 301, 82 N.W. 152 (1900); *Robinson v. Superior Rapid Transit Ry.*, 94 Wis. 345, 68 N.W. 961 (1896); *Milwaukee & Miss. R.R. v. Finney*, 10 Wis. 330 (1860).

120. 89 Wis. 440, 62 N.W. 186 (1895).

either Congress or the state legislature has provided for punitive damages by statute. The statutory provisions are of two categories: (1) those expressly providing for punitive damages;¹²¹ and (2) those providing for either double or treble damages.¹²² The large number of state and federal laws providing for punitive damages in the two categories preclude a comprehensive listing in this article. Counsel is well advised to check the statutory law on a case by case basis.

In most instances the conditions under which statutory punitive, double, or treble damages are allowable are less stringent than the common law requirements of malice or vindictiveness. Ordinarily, all that counsel has to prove is the violation of the statute to establish a *prima facie* case. For example, Wisconsin Statutes section 706.06(4) concerning authentication of property documents provides:

(4) In addition to any criminal penalty or civil remedy otherwise provided by law, knowingly false authentication of an instrument shall subject the authenticator to liability in tort for compensatory and punitive damages caused thereby to any person.¹²³

A "knowingly false authentication" would give rise to a cause of action for punitive damages.

In *John Mohr & Sons, Inc. v. Jahnke*¹²⁴ the court considered whether the plaintiff was entitled to both common law punitive and statutory treble damages in an antitrust case.¹²⁵ The court stated that a statute creating a cause of action for treble damages was punitive in nature, and that when a statute creates a cause of action and provides a remedy, the remedy is exclusive. The court also held that allowing both common law punitive damages and treble damages which did not require proof of wilful or malicious intent represented a double recovery of a penalty and thus violated the "basic fairness of a judicial pro-

121. *E.g.*, Wis. STAT. § 425.301(1) (1973) (Wisconsin Consumer Code); Wis. STAT. § 706.06(4) (1973) (deeds, false authentication); Wis. STAT. § 968.31(d) (1973) (misuse of wiretaps).

122. *E.g.*, Wis. STAT. § 174.03 (1973) (dog bite, double damages); Wis. STAT. § 174.04 (1973) (dog bite, treble damages); Wis. STAT. § 133.01(1) (1973) (monopolies and unfair trade — treble damages).

123. Wis. STAT. § 706.06(4) (1973).

124. 55 Wis. 2d 402, 198 N.W.2d 363 (1972).

125. Wis. STAT. § 133.01(1) (1973).

ceeding required by the due process clause of the fourteenth amendment."¹²⁶

In certain actions the legislature has specifically prohibited any award of punitive damages as in tort actions against political corporations,¹²⁷ state officers or state employees.¹²⁸

The law of punitive damages continues to expand both by court decision and legislative enactment. The courts of Wisconsin have demonstrated a cautious approach, giving due consideration to the interests of both the plaintiff and defendant. This has resulted in an orderly development of the law which will be quite helpful when lawyers are asked to advise clients as to their rights in the future.

126. 55 Wis. 2d at 409, 198 N.W.2d at 367.

127. WIS. STAT. § 895.43(2) (1973).

128. WIS. STAT. § 895.45(4) (1973). *See also* WIS. STAT. § 895.02 (1973) (punitive damages not allowed in a survival action).